No. 14254.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC EMPLOYERS INSURANCE COMPANY, a corporation,

Appellant,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation,

Appellee.

APPELLEE'S BRIEF.

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Statement of the Case.

For the purpose of this appeal, there are only two insurance companies involved in the action for declaratory relief.

The present action was brought in the United States District Court for the Southern District of California, Central Division, where originally four insurance companies were litigating their respective liabilities, under their respective policies of insurance. Two of the insurance companies, Anchor Casualty Company and United States Fidelity & Guaranty Company, insured the Minnesota Mining & Manufacturing Company, but they were granted motions for summary judgment in their favor in

the District Court. The Pacific Employers Insurance Company, hereinafter called Pacific, is the appellant, and Hartford Accident & Indemnity Company, hereinafter called Hartford, the appellee, both insured William P. Neil Company, Ltd., a corporation, hereinafter called Neil Co.

Pacific appeals from the judgment of the lower court which held that Pacific and Hartford were co-insurers of Neil Co.; that they were both liable and responsible for payment of damages to R. D. Carter for personal injuries he received while working on the premises owned by Minnesota Mining and Manufacturing Company; that the co-insurance created equal liability and responsibility is not reduced or affected by any "subrogation" claim of the defendant Pacific; that since both companies had a previous agreement whereby each had paid one-half of the money owed Carter under a settlement negotiated by Hartford, there was nothing due and owing from one party to the other.

The accident, which was insured against by the two parties to this appeal, occurred on November 18, 1947, when one R. D. Carter was working as an employee of the California Electric Power Company on the premises owned by Minnesota Mining and Manufacturing Company. He was working in an area beneath and beside a retaining wall which had been built by the Neil Co., the general contractor in charge. There was a backfilling operation going on at the time by the Neil Co. under the general supervision of Andrew Jensen, and more particular direction by the two foremen in charge, Hubert Jones and Robert Grace, both supervisory employees of Neil Co. The latter two men were in charge of equipment and men in this particular area, and the truck being used

at the time was owned by Minnesota Mining and Manufacturing Company, but loaned to the Neil Co. for their use.

The driver of the truck, Walker, was a Neil Co. employee, and was being directed by a flagman, Ford, also a Neil Co. employee, as to where to dump the load. The load was dumped close to the wall where the dirt was already level with the top of the wall or a little above. Some of the material, a large rock, went over the wall and fell upon Carter, injuring him.

Carter filed a complaint for damages in the Superior Court of the State of California, in and for the County of Riverside, alleging that defendants Minnesota Mining & Manufacturing Company and Neil Co. were negligent in the building operation and that this negligence was the proximate cause of his injury.

Thereafter this action for declaratory relief was filed, but that before said action could be tried, Hartford Accident and Indemnity Company and appellant Pacific Employers Insurance Company entered into a contract whereby appellee Hartford could negotiate and settle Carter's claim, and the agreement provided further that each would pay one-half of the amount, but that this would not in any way affect the declaratory relief action pending, and that each would be bound by the court's decision.

Statement of the Evidence.

The two insurance companies involved in this appeal issued insurance because of an agreement entered into by the Neil Co. and Minnesota Mining & Manufacturing Company. [R. p. 191 etc.] Pursuant to some of the terms agreed upon, Neil Co. was bound to purchase in-

surance. Now the importance of the contract lies in several of the clauses, *i. e.:*

Article 8 [R. p. 198] where the owner of the premises, Minnesota Mining & Manufacturing Company, retained the right to perform work as it deemed necessary. This of course implies that the contractor, Neil Co., was to have complete supervision, and exercise control, but that the owner "Reserved the right" to come upon the premises and do such work as it desired.

Article 15 [R. p. 202], where the owner "shall have the right to inspect the work" etc. This also implies and shows the intent of the parties that Neil Co. was to be in control, but that of course the owner has the right to inspect as the job proceeded.

Article 16 [R. p. 202], where the permits were to be obtained by the contractor, and not the owner, implying that the contractor was the moving party in controlling what went on and any of the preliminary procedure.

Article 20 [R. p. 205], whereby the contractor was to check on all labor and material, and that the owner should be afforded access to the work going on and see the material and inspect the books and records. This clearly points up how the control of the premises was given to Neil Co. and how the Minnesota Mining & Manufacturing Company had to reserve to itself the right to come on the premises.

Article 24 [R. p. 206], signifies how it was the contractor's responsibility to examine and determine the use of the building site.

Article 26 [R. p. 207], points up how the contractor is responsible for the work, and to take

charge of it and be responsible for any loss or injury from any cause.

Article 27 [R. p. 207], where the contractor was to provide all danger signals and warnings.

Article 34 [R. p. 208], declares that the contractor has the burden of laying out all work, and verify dimensions of old work, which would be affected and be added to by the contractor.

In referring to the Pacific policy [R. p. 41], it is noted that the insuring clause is of the broad comprehensive type, and only limited by the stated exclusions. Since this policy was entered into because of the agreement between Neil Co. and Minnesota Mining & Manufacturing Company pursuant to Section 18(b) [R. p. 204], the intent of the parties is signified by the facts of the type of policy purchased, that is, to cover in the broadest, general terms the work of the contractor on this particular project, including automobiles on the premises controlled by Neil Co.

The Hartford policy [R. p. 23] is an automobile policy purchased to insure the contractor as to all motor vehicles used by it in the work and belonging to it.

An easement was given by the owner of the property to California Electric Power Company for the purpose of allowing the "Power Co." to install, maintain, repair, and replace electric lines and cables upon, over and across the property owned by Minnesota Mining and Manufacturing Company. [R. p. 429.]

Neil Co. was to construct a granules plant, and the contract called for a cost plus operation. Because part of the contract called for leveling and building of a retaining wall where an electric substation could be built, part of a hill was dug away and a concrete retaining wall

erected. In the above operation and in backfilling behind the wall, Neil Co. used two Euclid trucks, besides other equipment, under an oral agreement with the Minnesota Mining & Manufacturing Company [R. p. 219], and such trucks were under the control of Mr. Jones, a Neil Co. employee. [R. pp. 312, 370.] The operators of the trucks were under Mr. Jones' control. [R. p. 371.]

Immediately previous to the time of the accident on November 18, 1947, there had been a backfilling operation under the direct supervision of Mr. Jensen and Mr. Jones. The driver of the truck, Walker, and the flagman who was directing him where to dump, after lunch dumped one or two loads [R. p. 156], when the load that caused the accident was dumped and a large rock went over the retaining wall and struck Carter. On November 16, 1948, Carter commenced an action in the Superior Court of the State of California in and for the County of Riverside against Minnesota Mining & Manufacturing Company, the Neil Co. and others, seeking damages in the amount of $53,534.72. [R. pp. 69, 74-80.]

On March 18, 1950, this present action for declaratory relief was filed by Hartford. Later, on January 15 and 17, 1951, Hartford and Pacific agreed [R. pp. 132-136] to authorize Hartford to settle the Carter case, subject to protection of the rights of the two insurance companies pursuant to the agreement, which in effect stated, that by settling there should be no prejudice as to any of the rights under the respective policies, and when the declaratory relief action was adjudicated the parties would pay in accordance with that decision any money that they would have been required to pay had the declaratory relief action been pronounced prior to judgment in the Carter case.

(a) Neil Company Employees, Their Connection With the Project, Their Duties, Actions, and Pertinent Statements.

William P. Neil, President of the Neil Co., came upon the premises and inspected the site and the progress of the work about once every two weeks to once a month. [R. p. 403.] The Neil Co. drew all the plans and did all the engineering during the entire course of the construction. [R. p. 390.]

David H. Archibald was the Vice President of the Neil Co., and he visited the premises and issued orders to Jensen, the general superintendent. [R. p. 387.] Mr. Archibald states that Nienaber, engineer for Minnesota Mining & Manufacturing Company, did not exercice any control over the number of employees. [R. p. 391.] There were no negotiations as to the use of the Minnesota Mining & Manucturing Company's trucks, only that Nienaber said to go ahead and use them. [R. p. 393.] The Neil Co. hired subcontractors. [R. p. 404.] The material that was brought in was not Minnesota Mining & Manufacturing Company's until it was finished and the invoice paid. [R. p. 409.] The Neil Co. even repaired the equipment of Minnesota Mining & Manufacturing Company, and also had it oiled, etc. [R. pp. 409-410.]

The superintendent for the Neil Co. on the job was one Andrew L. Jensen. [R. pp. 306-307.] Jensen states that he only once had a difference of opinion with Vroman of Minnesota Mining & Manufacturing Company as to how things were to be built and the costs involved, and Jensen prevailed, and he was never told to do a job in a particular way. [R. p. 309.] Neil Co. used all equipment, no matter who owned it, and also furnished the men to work the equipment. [R. p. 312.] Neil Co. constructed on all parts of Minnesota Mining & Manu-

facturing Company's property, and Jensen states that he believed he had power to tell California Electric when they could come in and start working [R. pp. 314-316], but apparently he didn't, as they came in anyway after he told them they were premature in their actions. They did leave when he first told them [R. pp. 316-318], but came back and went to work again later and Jensen knew this and he knew also his men were backfilling, but didn't tell the California Electric men to stay away. [R. p. 319.] Jensen said that someone told him that the Power Co. was there and that the dumping and backfilling was getting close to the top of the wall, underneath which the Power Co. was working, and that he sent Grace, a Neil Co. employee, to go up some time later and to "clarify" the matter, but not to "Stop" the operations. [R. p. 320.] Guards were hired by Neil Co. to watch over the construction area. [R. p. 325.]

Robert C. Grace was a labor foreman for Neil Co., and his superior in the Neil Co. was W. L. Crockett. [R. p. 70.] He was in charge of John Ford, the flagman, a Neil Co. employee, who directed the dumping of the trucks. [R. p. 171.] Mr. Grace had been in charge of building the retaining wall, and was at the time of the accident in charge of the operations involving the backfill. [R. p. 178.] Grace had been told by Jones to backfill on the day of the accident. [R. pp. 179-180.] Mr. Grace states that he told Fry (employee of Power Co.) to keep his men out until the dumping was over. [R. p. 182.] *He further stated that after the accident, Mr. Jensen asked if*

he hadn't got his message about stopping the backfilling process and he told him he had not. [R. p. 185.]

Hubert Jones was in charge of excavation and was under the orders from Andrew Jensen. [R. pp. 368-381.]

R. A. Walker was a driver of trucks, employed by Neil Co. [R. p. 138.] Hubert Jones was his immediate superior, and gave him his order to backfill on the day in question, along with another driver by the name of Foxx. [R. p. 147.] Mr. Ford, the flagman, was there spotting the loads for the drivers. [R. p. 149.] He had received no instructions from anyone as to keeping the loads small enough so that they wouldn't spill over. [R. p. 153.]

(b) Other Personnel in the Area.

A. L. Nienaber was a construction engineer, and was the representative of the owner on the premises. [R. p. 229.] An auditor was the only other Minnesota Mining & Manufacturing Company employee on the premises, except when Mr. Vroman came out periodically. [R. p. 234.] He states that the Neil Co. kept guards there to keep unauthorized persons out of the area. [R. p. 238.] He further states that he didn't make inspections to supervise. [R. p. 249.] Mr. Nienaber never seemed to supervise or exercise any control, but, on the contrary, when he saw something that needed changing, he would call it to the attention of Jensen, and if not acted upon, to Mr. Neil himself. [R. pp. 254-255.] At the time of the accident the trucks were in the possession of the Neil Co. and used by them exclusively. [R. p.

283.] The equipment was turned over completely to Neil Co. for their use and not subject to any other supervision. [R. p. 286.] Nienaber was interested only in the end result of the construction for his company, and no one from Minnesota Mining & Manufacturing Company ever directed the detailed operation of any of the work. [R. p. 287.]

California Electric Power Company had a crew on the premises of Minnesota Mining & Manufacturing Company under the direction of R. R. Fry. [R. p. 347.] He states that he was never told not to work in the area where the accident occurred. [R. p. 353.] He stated that the dirt was up over the level of the wall. [R. p. 358.]

H. G. Paxon qualified as an expert in underwriting insurance contracts, and stated that the word "control" as set forth in Pacific's policy, meant "Work place," like a place where any contractor worked. [R. p. 419.] He further stated that he had talked with contractors, and it was with this type of policy (Pacific's) in which they covered their liability in their work places. [R. p. 422.]

The pertinent language of the policy in regards to "control," appears under the exclusion:

> "This policy does not apply: (a) Except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of (1) automobiles while away from premises owned, rented or *controlled* by the insured or the ways immediately adjoining, or . . ." [R. pp. 43-44.]

ARGUMENT.

A. There Is No Primary or Secondary Insurance Theory Applicable in California.

Appellee respectfully submits to this honorable court that the substantive law of the State of California has steadfastly held that there is no such doctrine as propounded by the appellant, to wit, different degrees of liability in relation to joint liability for torts.

The case of *Consolidated Shippers, Inc. v. Pacific Employers Ins. Co.,* 45 Cal. App. 2d 288, 293, 113 P. 2d 34, holds that there is no law in the state, nor case upholding the theory of primary and secondary liability. The court there says at page 293:

> "Pacific contends that Harvey was primarily liable, that plaintiff was secondarily liable and that the judgment correctly determines the respective liabilities. No California case is cited in support of this proposition and we know of no law in this state fixing degrees of liability in relation to joint liability for torts. From the fact that an action to recover damages for injuries resulting from the negligence of an employee may be maintained against either the employer or the employee alone (Schilling v. Central Calif. Traction Co., 115 Cal. App. 30 [1 P. 2d 53]), or against both jointly, it would seem that there could be no such thing as primary and secondary liability.
>
> ". . . In view of our conclusion that both policies insured the same risk so far as a plaintiff is concerned, the fact that plaintiff's liability may have been primary or secondary becomes immaterial. Regardless of the nature of such liability, any loss resulting therefrom was covered by both insurers."

A later California case, *Air Transport Mfg. Co. v. The Employers' Liability Assurance Corp.,* 91 Cal. App. 2d 129, 132, 204 P. 2d 647, holds that

> "Another line of authorities holds that each insurer is primarily liable for the losses of its named assured and secondarily liable as an excess carrier for other losses. (Citing non-California cases.) This principle cannot apply in California for the reason that there is no such thing as primary and secondary liability as between a vehicle owner and the operator thereof with permission. (Consolidated Shippers, Inc. v. Pacific Employers Ins. Co., 45 Cal. App. 2d 288 (114 P. 2d 34).)"

In a recent California case, in which Pacific Employers Insurance Company was an appellant, the court again reiterated its previous position, *Employers Liability Assurance Corp. of London, Eng. v. Pacific Employers Ins. Co.,* 102 Cal. App. 2d 188, 227 P. 2d 53 at 193:

> "The theory that the insurer covering the primary tort feasor is liable to its policy limits and the insurer covering the secondary tort feasor is liable for excess insurance only has been rejected in California. (Consolidated Shippers, Inc. v. Pacific Emp. Ins. Co., 45 Cal. App. 2d 288, 114 P. 2d 34; Air Transport Mfg. Co., Ltd. v. Employers' Liability etc. Corp., 91 Cal. App. 2d 129, 204 P. 2d 647.)"

From the foregoing substantive law, it must be concluded that the trial court decided correctly that the two parties to this action were co-insurers, and that the loss should be apportioned equally, as per the rule as set forth in *Lamb v. Belt Casualty Co.,* 3 Cal. App. 2d 624, 40 P. 2d 311.

It is further respectfully urged that this honorable court apply the above substantive law of California to

the case at bar, such law was probably cited to the court in the *United Pacific Ins. Co. v. Ohio Casualty,* 172 F. 2d 836, and was discussed in *Canadian Ind. Co. v. United States Fidelity and Guaranty Co., et al.* (C. C. A. 9th), decided on June 15, 1954. These cases, though, have no facts similar to those of this case. The previous cases relied on facts adjudging the employer liable on the application of the doctrine of *respondeat superior,* whereas in the case at bar the employer-insured is liable without such a doctrine, and here the insured is not the plaintiff.

B. There Is No Basis Upon Which Appellant May Claim Any Right to Subrogation.

(1) There Is No Contribution Between Joint Tort Feasors Under California Law.

Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875;

Jackson Co. v. Woods, 41 Cal. App. 2d 777, 107 P. 2d 639.

In effect Pacific is asking this court to allow Pacific to be subrogated to the Neil Co. position, who ordinarily would have a cause of action for recoupment against its negligent employee, the flagman Ford, or the driver Walker. But in this case the lower court properly found that Neil Co. itself was guilty of negligence, independent of the negligent operation of the truck and flagman. Since this is true, if a right of subrogation were allowed, this would be granting a contribution between joint tort feasors, in that the insured, Neil Co., and the flagman and the driver were negligent. This particular operation was the result of negligence on the part of the supervisorial employees of Neil Co., *solely insured by Pacific.* Further, in any action brought by Neil Co. against its

employees, they would have available to them the defense of contributory negligence on the part of the Neil Co., because of the negligence of their key supervisory men. This would reward the company for directions given to workmen which were negligently made, asking the workman to pay to the employer for the bad results of the orders given by the employer. This would be asking the court to do something it may not do. In *Liverpool, London & Glove Ins. Co. v. Southern Pac. Co.,* 125 Cal. 434, 58 Pac. 55, the court stated the rule that an insurance company may subrogate itself to the rights of its assured, but only if there was no contributory negligence on the part of the insured.

It must be noted that the facts in this present case are not similar to the cases cited by appellant, *i. e., United Pacific v. Ohio Casualty, supra; Maryland Casualty Co. v. Employers Mutual Liability Co. of Wisconsin,* 208 F. 2d 731, and recent case of *Canadian Ind. Co. v. U. S. F. & G., supra.*

In all of the above cited cases, there were *no* facts whatsoever making the party insisting on subrogation liable, those cases being cases involving strictly two automobile policy coverages, whereas in the case at bar the party to whom Pacific desires to be subrogated, Neil Co., are insured by Pacific as to all acts, and Neil Co. was specifically found by the lower court to be negligent in the acts of its supervisorial employees which caused the accident. Hartford did not insure those acts or those employees.

(2) That Even if the Court Could Possibly Find Some Right to Subrogation in Regards to Pacific's Claim, This Right Had Not Been Exercised and Has Been Barred by the Statute of Limitations, California Code of Civil Procedure, Section 340, Subdivision 3.

California law does not agree with the theory put forth by appellant, that the statute of limitations is based on an implied contract of indemnity. California distinctly holds that in an action by the insurer subrogated to the rights of an insured for his negligence, the insurer is subrogated to the same statute of limitations as the insured. (*Automobile Ins. Co. of Hartford Conn. v. Union Oil Co. of Calif.*, 85 Cal. App. 2d 302 at 304, 193 P. 2d 48.) California's statute of limitations is one year for personal injury actions due to negligence. Thus when Pacific paid money on its share of the settlement with regard to R. D. Carter on January 27, 1951, this cause of action for subrogation was barred on January 27, 1952, which was before the trial and submission of this declaratory relief action, and no action on its so-called subrogation was ever begun. Since Pacific desires to be subrogated to the Neil Co. position, it is only proper that the court determine whether or not any further adjudication would be futile, *i. e.,* because any action that Pacific might bring would have as valid and conclusive defense the statute of limitation, contributory negligence, and the rule against contribution between joint tort feasors.

Appellant's citations in regard to an implied contract of indemnity may very well be true, but they do not pertain to the case at bar, where there is the problem of a subro-

gation right. In *Bradley v. Rosenthal, supra,* the case dealt with the question of possible recoupment by the principal from his agent, for money expended by the principal because of liability fixed on the principal for the negligent acts of the agent, because of the doctrine of *respondeat superior.* This is recoupment, not subrogation.

Appellant also cited *Crystal v. Hutton,* 1 Cal. App. 251, 81 Pac. 1115. This case involved a person who signed a promissory note as a co-maker, but designated himself as a surety, and when he was forced to pay the note, his sole remedy is against the principal maker of the note on an implied obligation to reimburse, and the statute of limitaitons is two years for this contract matter that was not in writing.

Appellant's only other citation as to the statute of limitation is *Bray v. Cohn, 7* Cal. App. 124, 93 Pac. 893. In this case there was a surety on a written promissory note, and after he had been forced to pay it, the court held that his remedy was on implied obligation against the principal maker of the note, and that the statute of limitation on such an implied contract was two years. Again, this has no relevancy with the facts at hand.

As to the effect of the agreement entered into between Hartford and Pacific [R. pp. 132-136], this agreement stated that there would be no waiver of any rights under the policies. This of course meant that any defenses or exclusions as to the insured would still be available, and further the provision relating to paying the sums as they would have been required to pay had the declaratory relief

judgment been before settlement of the Carter case, only referred to the possibility of having the declaratory relief judgment declare the rights differently. This in no way implies any intent to withhold the running of a limitation of action, as that defense would be available as a personal defense to the truck driver and the flagman. If the declaratory relief judgment had come first before the Carter settlement, then the statute of limitation would begin when the settlement of the Carter action was effected, as was the case at bar, and there would be still present one year from the time of such settlement to commence a subrogation action. This Pacific and Neil Co. did not do.

(3) The Court Has No Authority to Establish Subrogation Rights and Liabilities in This Action.

Pacific's prayer in their answer in the case at bar makes no provision for the order or findings in regard to any subrogation rights, and it is the familiar rule that this point can't be first raised on appeal. Secondly, that in the Carter action, the flagman and truck driver were not made parties, so their liabilities in that action were not litigated.

Appellant is apparently urging that the *United Pacific Ins. Co.* case, *supra,* decided such an issue and that this is binding on this court. It must be noted that on page 840, note 4, of that case the counsel to the action stipulated and agreed to have all issues decided, and it appears without this the court thought it didn't have authority or jurisdiction to decide the subrogation issues of another action.

C. The Supervisory Employees of Neil Co. Were Negligent, and This Distinguishes This Present Case From That of United Pacific Ins. Co. v. Ohio Casualty Ins. Co., and Canadian Indemnity Co. v. United States Fidelity & Guaranty, Et Al.

(1) The finding of the lower court, XXV [R. p. 120], that the supervisory employees of Neil Co., other than the truck driver, were negligent in the management of loading and dumping operations, and that this contributed proximately to the accident and injuries of R. D. Carter are substantially supported by the facts as set forth in appellant's statement of facts in regard to Robert C. Grace, the labor foreman over the flagman, and Hubert D. Jones who was in charge of the truck drivers, and Andrew Jensen, General Supertintendent of the Neil Co. These three men had supervision and control over the area in question where the backfill was taking place, and they all negligently allowed the continuance of such backfilling, even after they knew others were working under the edge of the wall, and that the dirt was up to the edge of the wall and liable to spill over and down into the area where the Power Co. was working. They knew it was dangerous and had ordered out the Power crew once because of this danger, but did nothing effective when they returned to work, even though the job was even more dangerous because the fill had reached the top of the wall or even over the top, and knowledge of the danger was proven by the order to stop the dumping, which order was negligently not delivered.

It must be noted that negligence is either an act of omission or act where there is a duty owing, and there is no more culpability of the neglect whether it be active or passive.

In *Basler v. Sacramento Gas & Elec. Co.,* 158 Cal. 514, 111 Pac. 530, where at page 518 the court stated:

> "It is also true that negligence may be active or passive in character. It may consist in heedlessly doing an improper thing or in heedlessly refraining from doing the proper thing. Whether the circumstances call for activity or passivity, one who does not do what he should is equally chargeable with negligence with him who does what he should not."

(2) Under California law, the acts of the negligent supervisory employees are acts of the corporation and the negligence of the corporation is direct, and not based upon the doctrine of *respondeat superior.*

Upon close examination of the case that appellant urges is so binding on this point, that of *Bradley v. Rosenthal,* 154 Cal. 420, 97 Pac. 875, it will be noted that the case does not stand for all that appellant believes it does. The facts were that there was serious dispute as to whether or not Rosenthal was an agent of the corporation he claimed to work for, and that is in no way similar to the facts at bar, where there were men of supervisory caliber supervising and controlling the Neil Co. operations as an independent contractor. The facts in the *Bradley* case were that the jury found Rosenthal not liable, and yet found the telephone company liable, and the appellate court expounded the recognized rule in reversing the judgment that it must be an act of the corporation to make it liable alone and not by some imputation from an agent or employee. In the case at bar there is substantial evidence as pointed out that the company was liable alone and not through any imputation. Besides, in the *Bradley* case, the corporation was found not liable by the appellate court because there was a doubt as to whether it had even given any instructions to Rosenthal, or just whether

Rosenthal was to do the work and then sell his work to the telephone company.

Appellant is in error when he states that there has to be a directed act, by the corporation, to make them directly liable, and not just liable because of some inputation of negligence. He is correct if he means that directed acts cover the general corporate policy, especially where contractors are involved. Even both cases cited by appellant to show there were exceptions to his contended rule, uphold appellee's position. The cases are *McInerney v. The United Railroads,* 50 Cal. App. 538, 195 Pac. 958, and *Benson v. Southern Pacific,* 177 Cal. 777, 171 Pac. 948, and both of them do not meet appellant's contention as to a directed act. In the *McInerney* case, the corporation had a policy during the strike to protect its property, not to break up the strike as suggested by appellant, and that they were to use all lawful means in protecting its property and keeping the trains moving. Those were the only directions given, or in reality, no orders as such, but just a policy to do their job, that was to keep transportation moving. This is of course closely akin to that of our case, where there were no orders as such, only policy to get the job done, and as quickly as possible, as cited in the evidence.

In the *Benson* case the only policy involved was that of meeting a schedule of time, and speed was permitted to meet that schedule. There was no direction as such, just as there was none in the *McInerney* case, and in both of those cases the corporate defendant was held liable while the acting agent was found not liable, and exonerated, thus meeting directly the case at bar, so as to show that the corporation can be negligent itself in its operations, and if such be true, then they would have no right to any subrogation, because they themselves were negligent.

Another case in point is that of *McCullough v. Langer,* 23 Cal. App. 2d 510, 73 P. 2d 649, where the court held that the employer, a doctor, was not liable under *respondeat superior* only, but rather as a joint participant, so that the nurse could be found non-negligent, and yet find the doctor negligent as an employer, and the court cites on page 516 the *Benson* and *McInerney* doctrines with approval.

In the case of *Newman v. Fox West Coast Theatres,* 86 Cal App. 2d 428, 194 P. 2d 706, the facts were that the plaintiff sued the manager and the owner-corporation for an injury from slipping in the ladies' room. The jury exonerated the manager, but held the defendant theatre corporation liable. On appeal the court held that the owner-corporation was a joint participant and could be liable alone, or with the manager, in that it was its policy and rules that made it liable, and was not just liable on the theory of *respondeat superior.*

The case at bar is even stronger for applying liability against the contracting corporation directly, and not on any basis of *respondeat superior,* in that there was the policy to keep the work speeded up, and there was a general superintendent on hand at all times who represented directly the corporation through its designated officers, Mr. Neil and Archibald. Thus the supervisory employees were carrying out and furthering corporate policy, as directly as possible when an entity is involved, and it would be unjust not to be able to hold a corporation directly liable for the negligent acts or omissions of its supervisory help, even though the supervisor might himself be found not negligent. They ordered the work to proceed and were warned of its danger, realized the danger, and negligently failed to stop the work.

D. The Neil Co. Did Have Control of the Premises Within the Meaning of the Pacific Insurance Policy.

(1) Insurance Policy of Pacific and Its Meaning.

Understanding now that insurance policy issued by Pacific was done to meet the agreement entered into between Neil Co. and Minnesota Mining & Manufacturing Company, it is important to note the language of the policy itself. [R. p. 41.] The insuring agreement is of the usual broad, comprehensive type, purchased, as is admitted by appellant in order to fulfill Neil Co.'s promise to buy this type of insurance. [R. p. 204.] The insurance was to cover

> ". . . to protect the Contractor from damage claims arising from operations under this contract, as shall protect it and any subcontractor performing work covered by this contract, from claims for damages for personal injury, including accidental death, as well as from the claims for property damage which may arise from operations under this contract, whether such operations be by itself or by any subcontractor or by anyone directly or indirectly employed by either of them."

This is what the insurance was to cover, and it shows clearly the *intent* of the parties to be fully covered, and there was no thought that this contract wasn't directly written for and aimed at covering all the construction and automobiles on the Minnesota Mining and Manufacturing Company premises. It seems then unjust that now when there is some claim under the contract that the insurance company can come in and say, we never covered any of your trucks where you didn't control the premises, and of course Neil Co. didn't control that area in which

the accident occurred. This would mean in effect that there was never any insurance coverage if the appellant's position were followed. They should be estopped from asserting such a position!

The clause they rely on is the exclusion (a) [R. pp. 43-44]:

> "This policy does not apply: (a) Except with respect to operations performed by independent contractors, to the ownership, maintenance or use, including loading or unloading, of (1) automobiles while away from premises owned, rented or controlled by the Insured or the ways immediately adjoining or . . ."

The truck in question was not away from the premises "controlled" by the insured. The general rule is cited in *Goss v. Security Ins. Co.,* 113 Cal. App. 577, 298 Pac. 860 at 580:

> "A policy or contract of insurance is to be construed so as to ascertain and carry out the intention of the parties, viewed in the light of surrounding circumstances, the business in which the insured is engaged and the purpose they had in view in making the contract."

(2) General Business Understanding as to "Controlled Premises."

Neil Co. was an independent contractor, and under general business practices had control and supervision over the area in which they worked. Mr. Paxon, an expert witness, testified that the word "control" would be synonymous with the words "work place." [R. p. 419.] There was never any indication from any of the evidence gained in this action, that Neil Co. didn't completely supervise and run the construction, and be able to maintain guards

to keep unauthorized personnel off the premises. In a narrower sense, it would be necessary only to show control in the area in which the accident took place, and this is shown by Jensen telling the Power Company to leave at one time, and they followed his orders. [R. pp. 317-318.] Another Neil Co. employee had charge of the area of backfilling, Robert Grace [R. p. 178], and this is where the dumping was being done and where the accidental event started and surely where Neil Co. had at least temporary exclusive control.

The existence of an easement in no way limits the control of the owner, except as to that which was intended by the grant. As was stated in *Langaza v. San Joaquin L. & P. Corp.*, 32 Cal. App. 2d 678, 90 P. 2d 825, at 686:

> ". . . The record shows that the owner of the real property granted a 'right of way' to the power company over a strip of land 20 feet in width, with the right to erect a single line of towers or poles thereon and wire suspended thereon. 'The rights of any person having an easement in the land of another are measured and defined by the purpose and character of that easement; and the right to use the land remains in the owner of the fee so far as such right is consistent with the purpose and character of the easement' (17 Am. Jur. 993)."

Thus, in the case at bar the owner still had the right to control the land and Minnesota Mining & Manufacturing Company gave this right to Neil impliedly or expressly by having Neil Co., as independent contractors, manage the whole operation. It is inconceivable that Pacific can

assert that because someone has an easement in gross for ingress and egress that this stops anyone else from having control.

As cited in *J. G. Speirs & Co. v. Underwrites at Lloyd's,* 84 Cal. App. 2d 603, 191 P. 2d 124:

> "In Rose v. Union Gas & Oil Co., 297 F. 16, it (control) is defined as follows: 'The word control does not import an absolute or even qualified ownership. On the contrary it is synonymous with superintendence, management, or authority to direct, restrict, regulate.' "

That is the type of "control" that the appellee claims was meant, supervision, etc. The *Speirs* case, *supra,* also cites with approval cases standing for the same proposition, *i. e.,* that control does not mean complete control, citing *Dinan v. Superior Court,* 6 Cal. App. 217, 91 Pac. 806; *McCarthy v. Board of Supervisors,* 15 Cal. App. 576, 115 Pac. 458; and *Coffey v. Superior Court,* 146 Cal. 525, 82 Pac. 75.

As to appellant's argument that if Neil Co. had complete control of the premises the accident would never have happened, this is wishful thinking, as the Power Company had been told to stay away, but they did not do so, and Jensen decided to stop the dumping, but negligently failed to do so.

In *Louthan v. Hewes,* 138 Cal. 116, 70 Pac. 1065, at 119, the court held that even though the owner kept possession of the premises where the independent contractor was working, the builder-contractor had control of the work under the contract.

Conclusion.

It is respectfully submitted:

1. That the two policies of insurance under the facts as stated both covered the risk involved, and as a result the two companies were co-insurers.

2. That the corporation, Neil Co., was negligent by the acts of its supervisory employees, and not solely liable due to the application of the doctrine of *respondeat superior* as to the driver or the flagman of the truck.

3. That Neil Co. controlled the premises where the construction was being done, and especially in the area of the backfilling process, from whence the rock came that injured R. D. Carter, and therefore Pacific insured the automobile during its use by Neil Co. at the time of the accident.

4. That the easement granted to the California Electric Power Company in no way lessened the control of the Neil Co. as to the premises in regards to coverage as intended and purchased from Pacific, in reference to the automobile truck used by them.

5. That there is no basis for subrogation, in that to allow such a right would be declaring a right in a party when that party was personally guilty of independent negligence in regard to the accident in question, and the insurance company asking such right insured it for those negligent acts.

6. That the statute of limitations had run against Pacific before this present action was tried, so as to bar any further action on their part, they having failed to commence their actions against the driver or flagman.

7. That there is not in California according to its substantive law any such theory as propounded by appellant in regard to primary and secondary liability, and the case of *Eirie v. Tompkins,* 304 U. S. 64, would require this court to follow the California decisions so declaring.

8. That this honorable court will find substantial evidence to sustain the trial court, and will follow the required procedure of drawing every favorable inference in favor of appellee (*Hunter v. Shell Oil Co.,* 198 F. 2d 485; *Insurance Co. of North America v. Board of Education of Independent School District No. 12,* 196 F. 2d 901) which would require an affirmance of the trial court's decision.

We respectfully urge that the appeal herein is without any merit whatsoever and is not based upon the facts in the case.

Respectfully submitted,

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Attorney for Appellee.